

First Supplement to Memorandum 96-86

Mediation Confidentiality: Miscellaneous Developments

In considering the staff draft recommendation attached to Memorandum 96-86, the Commission should be aware of the following:

Further comments of the Department of Industrial Relations

In October, the Department of Industrial Relations ("DIR") commented that mediations conducted by the State Mediation and Conciliation Service ("SMCS"), a division of DIR, should "receive the same protection as that which would be provided to other mediators and mediation processes." First Supp. to Mem. 96-70, Exhibit p. 1.) DIR requested addition of the following language to Section 1120: "'Mediation' includes actions taken by the Department of Industrial Relations to mediate labor disputes, pursuant to Labor Code section 65." (*Id.*)

At its meeting on November 14-15, 1996, the Commission rejected that request. Among the Commission's concerns were: (1) overlap and interplay between Labor Code Section 65 and the Evidence Code provisions, (2) uncertainty about the role of SMCS mediators (in particular, whether they have decisionmaking authority and whether they submit evaluations to decisionmakers), and (3) a potential bandwagon effect, with other groups requesting similar treatment.

DIR now urges the Commission to amend Labor Code Section 65 as follows:

65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. ~~Records of the department relating to labor disputes are confidential; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record.~~ Any decision or award arising out of arbitration proceedings conducted pursuant to this section

shall be a public record. The provisions of Evidence Code section 703.5 and of Evidence Code Division 9, Chapter 2, beginning with section 1120, apply to all mediations conducted by the California State Mediation and Conciliation Service and to the persons presiding over those mediations.

[Exhibit p. 1.]

This change would eliminate the word “confidential” from Labor Code Section 65, so DIR also proposes removing the reference to Labor Code Section 65’s “confidentiality” from Section 1122(c) of the Commission’s draft proposal. (*Id.*)

These proposed revisions seem to address the concerns the Commission raised regarding DIR’s original proposal. If adopted (with technical revisions to conform to standard drafting practices), there would be no danger of overlap or inconsistency between Labor Code Section 65 and the Evidence Code provisions on mediation confidentiality. Because the Evidence Code provisions would apply to “the persons presiding over” SMCS mediations, those persons could not have decisionmaking authority (see Section 1120(a)(2) of the staff draft recommendation) and could not submit evaluations to decisionmakers (see Section 1123 of the staff draft recommendation). According to Mr. Fassler of DIR, that is consistent with the existing role of SMCS mediators. Finally, the danger of a bandwagon effect is diminished by placement of the provision in the Labor Code, rather than in the Evidence Code.

For these reasons, particularly the interest in harmonizing Labor Code Section 65 and the Evidence Code provisions on mediation confidentiality, the staff recommends making DIR’s proposed revisions.

Proposed reorganization of Sections 1120 and 1122

In the staff draft recommendation (pages 13-14, 18), the staff raised the possibility of reorganizing Section 1122 and de-emphasizing the definitional aspects of Section 1120. A proposal along those lines is attached for the Commission’s consideration (Exhibit pages 3-8).

Errors in the staff draft recommendation

Ron Kelly pointed out two errors in the staff draft recommendation: (1) on page 15, line 15, the phrase “or document” should be inserted after “testimony,” and (2) on page 20, line 52, the phrase “or done” should be inserted after “anything said.”

Explaining that Section 1120 focuses on function, not label

Section 1120 of the staff draft recommendation defines the terms “mediator” and “mediation.” The focus of those definitions is on function (what happens, what role a person plays), not on label (whether a proceeding is called a “mediation” or is conducted by a person who uses the title “mediator”). Ron Kelly suggests explaining as much in the Comment. That would help prevent misinterpretation, such as construing the term “mediator” to encompass only persons who call themselves “mediators.” The staff thinks this is a good suggestion.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

DEC-10-1996 15:24 FROM DIR OD LEGAL

TO

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STATE OF CALIFORNIA

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December 10, 1996

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Sent by FAX to (415) 494-1827

Re: Proposed Legislation- Mediation Confidentiality

Dear Ms. Gaal,

You advised me recently by telephone that the Commission was not in agreement with the additional provisions we suggested for the proposed legislation, described in my October 3 letter to you and the Commission. As an alternative, we suggest that the proposed legislation include a conforming revision of Labor Code section 65 that would apply the new privilege rules of the Evidence Code to mediations conducted by the State Mediation and Conciliation Service.

Specifically, we suggest that the last sentence of Labor Code section 65 (beginning with "Records of the department....") be deleted and that the following be added in its place:

Any decision or award arising out of arbitration proceedings conducted pursuant to this section shall be a public record. The provisions of Evidence Code section 703.5 and of Evidence Code Division 9, Chapter 2, beginning with section 1120, apply to all mediations conducted by the California State Mediation and Conciliation Service and to the persons presiding over those mediations.

The first sentence proposed here repeats language currently in the last sentence of Labor Code section 65. The second sentence proposed would apply the new law to mediations conducted by the SMCS. This change would eliminate the use of the word "confidential" in section 65. Therefore, the reference to Labor Code section 65's "confidentiality" should be removed from section 1122(c) of the Commission's draft proposal.

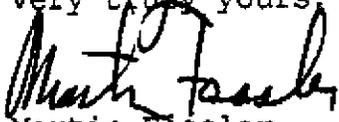
The State Mediation and Conciliation Service (SMCS) of the Department of Industrial Relations includes a staff of 15 mediators, in San Francisco, Los Angeles, Fresno and San Diego. We frequently provide mediation services to assist collective bargaining between public agencies - cities, counties, school

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districts, transit districts and special purpose districts - and unions of their employees. From time to time we provide mediators in collective bargaining disputes involving small private employers and their employees; some of these disputes concern procedures for elections to determine whether employees of a particular employer are to be represented by a union. Finally, the SMCS often provides list of potential arbitrators to parties who request such lists.

We urge addition of the changes suggested here to avoid the possibility that if the proposed legislation is enacted it may later be argued in a court proceeding in which one party seeks disclosure of events at a mediation session conducted by SMCS that mediation services provided by SMCS were intentionally excluded from the protections provided by the new statutory provisions.

Very truly yours,



Martin Fassler
Counsel for Director of Industrial Relations

MEDIATION CONFIDENTIALITY: PROPOSED REORGANIZATION OF SECTIONS 1120 AND 1122

1. PROPOSED NEW VERSION, DERIVATION NOT SHOWN

☞ **Staff Note.** To prevent confusion, this redraft uses decimal numbering (1120.1, 1122.1, 1129.1) for proposed new sections, rather than renumbering sections in the staff draft recommendation (“SDR”) attached to Memorandum 96-86. If the Commission adopts this redraft, in the final recommendation the numbering would be:

- 1120. Definitions
- 1121. Scope of chapter
- 1122. Mediation-arbitration
- 1123. Mediation confidentiality
- 1124. Types of evidence not covered
- 1125. Mediator evaluations
- 1126. Consent to disclosure of mediation communications
- 1127. Written settlements reached through mediation
- 1128. Oral agreements reached through mediation
- 1129. Attorney’s fees

§ 1120. Definitions

1120. For purposes of this chapter:

(a) “Mediation” means a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part.

(b) “Mediator” means a neutral person who conducts a mediation and includes any person designated by a mediator either to assist in the mediation or to communicate with the parties in preparation for a mediation. A mediator has no authority to compel a result or render a decision on any issue in the dispute.

(c) “Mediation consultation” means a consultation by a person with a mediator or mediation service for the purpose of retaining the mediator or mediation service.

§ 1120.1. Scope of chapter

1120.1. (a) This chapter does not apply to any of the following:

- (1) A court settlement conference.
- (2) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code.
- (3) A proceeding under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

[Alternatively, (a)(2) and (a)(3) could be replaced by a new (a)(2) stating: “a proceeding where the admissibility of the evidence is governed by Section 1818 or 3177 of the Family Code.” See existing Section 1152.5(b).]

§ 1122. Mediation confidentiality

1122. (a) Except as otherwise expressly provided by statute, evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation is not admissible in evidence nor subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) Except as otherwise expressly provided by statute, no document, or writing as defined in Section 250, or copy of a document or writing, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation, is admissible in evidence or subject to discovery, and disclosure of the document or writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants or mediators in the course of a mediation or mediation consultation shall remain confidential.

(d) The protection of this chapter applies to a mediation or mediation consultation notwithstanding the presence of a person who observes the mediation or mediation consultation for the purpose of training or evaluating the mediator or studying the process.

§ 1122.1. Types of evidence not covered

1122.1. (a) Notwithstanding any other provision of this chapter, evidence otherwise admissible or subject to discovery outside of mediation or mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or mediation consultation.

(b) This chapter does not limit any of the following:

- (1) The admissibility of an agreement to mediate a dispute.
- (2) The effect of an agreement not to take a default in a pending civil action.
- (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

§ 1129.1. Attorney’s fees

1122.2. If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a document, and the court or other adjudicative body determines that the testimony or document is inadmissible or protected from disclosure under Section 703.5 or this chapter, the court or adjudicative body making the

determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or document.

2. PROPOSED NEW VERSION, WITH DERIVATION IN ITALICS

§ 1120. Definitions

1120. For purposes of this chapter:

(a) "Mediation" means a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part. *(Same as SDR except that the phrase "compromising, settling, or resolving a dispute in whole or in part" is imported from Section 1122.)*

(b) "Mediator" means a neutral person who conducts a mediation and includes any person designated by a mediator either to assist in the mediation or to communicate with the parties in preparation for a mediation. A mediator has no authority to compel a result or render a decision on any issue in the dispute. *(Same as in SDR except it incorporates CDRC's language on mediation assistants.)*

(c) "Mediation consultation" means a consultation by a person with a mediator or mediation service for the purpose of retaining the mediator or mediation service. *(Based on SB 1522, which was enacted in 1996.)*

§ 1120.1. Scope of chapter

1120.1. (a) This chapter does not apply to any of the following:

(1) A court settlement conference. *(From Section 1120(c) of SDR.)*

(2) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code. *(See Section 1122(b) of SDR, which continues existing Section 1152.5(b).)*

(3) A proceeding under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code. *(From Section 1120(b) of SDR.)*

(d) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute. *(See SDR Section 1122(c).)*

§ 1122. Mediation confidentiality

1122. (a) Except as otherwise expressly provided by statute, evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation is not admissible in evidence nor subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. *(Same as SDR Section 1122(a)(1) except it incorporates language on intake communications, which is based on SB 1522.)*

(b) Except as otherwise expressly provided by statute, no document, or writing as defined in Section 250, or copy of a document or writing, that is prepared for

the purpose of, in the course of, or pursuant to, a mediation or mediation consultation, is admissible in evidence or subject to discovery, and disclosure of the document or writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. *(Same as SDR Section 1122(a)(2), except it incorporates (1) language on intake communications, and (2) technical revisions.)*

(c) All communications, negotiations, or settlement discussions by and between participants or mediators in the course of a mediation or mediation consultation shall remain confidential. *(Same as SDR Section 1122(a)(3) except it incorporates language on intake communications, which is based on SB 1522.)*

(d) The protection of this chapter applies to a mediation or mediation consultation notwithstanding the presence of a person who observes the mediation or mediation consultation for the purpose of training or evaluating the mediator or studying the process. *(From Section 1122(g) of SDR, with addition of language on intake communications, which is based on SB 1522.)*

§ 1122.1. Types of evidence not covered

1122.1. (a) Notwithstanding any other provision of this chapter, evidence otherwise admissible or subject to discovery outside of mediation or mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or mediation consultation. *(From SDR Section 1122(a)(4), with addition of language on intake communications, which is based on SB 1522.)*

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute. *(From SDR Section 1122(e). Consider whether to insert “executed” before “agreement.”)*

(2) The effect of an agreement not to take a default in a pending civil action. *(From SDR Section 1122(e). Consider whether to insert “executed” before “agreement.”)*

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute. *(From Section 1122(h).)*

§ 1122.2. Attorney’s fees

1122.2. If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a document, and the court or other adjudicative body determines that the testimony or document is inadmissible or protected from disclosure under Section 703.5 or this chapter, the court or adjudicative body making the determination shall award reasonable attorney’s fees and costs to the mediator against the person seeking the testimony or document. *(Same as SDR Section 1122(d) except (1) the accidental omission of “or document” is corrected, and (2) “determines” and “determination” are substituted for “finds” and “finding.”)*

3. EXISTING VERSION, WITH DISPOSITION IN ITALICS

§ 1120. “Mediation” and “mediator” defined

1120. (a) For purposes of this chapter,

(1) “Mediation” means a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement. *(Same in Section 1120(a) of new draft, except that the phrase “compromising, settling, or resolving a dispute in whole or in part” is imported from Section 1122.)*

(2) “Mediator” means a neutral person who conducts a mediation. A mediator has no authority to compel a result or render a decision on any issue in the dispute. *(Same in Section 1120(b) of new draft, except new draft incorporates the language on mediation assistants proposed by the California Dispute Resolution Council.)*

(b) This chapter does not apply to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code. *(Same in Section 1120.1(a)(2)-(a)(3) of new draft, except new draft refers to proceedings under Part 1 of Division 5 of the Family Code. See existing Section 1152.5(b).)*

(c) This chapter does not apply to a court settlement conference. *(Same in Section 1120.1(a)(1) of new draft.)*

§ 1122. Mediation confidentiality

1122. (a) Where persons conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part, the following apply: *(In the new draft, the phrase “for the purpose of compromising, settling, or resolving a dispute in whole or in part” is moved to Section 1120. The rest of this introductory clause is deleted as redundant.)*

(1) Except as otherwise expressly provided by statute, evidence of anything said or of any admission made for the purpose of, in the course of, or pursuant to, the mediation is not admissible in evidence or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. *(Same as Section 1122(a) of new draft, except new draft incorporates language on intake communications, which is based on SB 1522.)*

(2) Except as otherwise expressly provided by statute, no document, or any writing as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence or subject to discovery, and disclosure of the document or writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. *(See Section 1122(b) of new draft.)*

(3) All communications, negotiations, or settlement discussions by and between participants or mediators in the mediation shall remain confidential. *(Same as*

Section 1122(c) of new draft, except new draft incorporates language on intake communications, which is based on SB 1522.)

(4) Evidence otherwise admissible or subject to discovery outside of mediation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation. *(See Section 1122.1(a) of new draft.)*

(b) This section does not apply where the admissibility of the evidence is governed by Section 1818 or 3177 of the Family Code. *(See Section 1120.1(a)(2)-(a)(3) of new draft.)*

(c) Nothing in this section makes admissible evidence that is inadmissible under Section 1152 or any other statutory provision. Nothing in this section limits the confidentiality provided pursuant to Section 65 of the Labor Code. *(See Section 1120.1(b) of the new draft. The second sentence is omitted in the new draft, but would need to be incorporated if the Commission rejects the conforming revision of Labor Code Section 65 proposed by the Department of Industrial Relations.)*

(d) If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a document, and the court or other adjudicative body finds that the testimony is inadmissible or protected from disclosure under Section 703.5 or this chapter, the court or adjudicative body making that finding shall award reasonable attorney's fees and costs to the mediator against the person seeking that testimony or document. *(Same as Section 1129.1 of new draft, except (1) the accidental omission of "or document" is corrected, and (2) "determines" and "determination" are substituted for "finds" and "finding.")*

(e) Subdivision (a) does not limit either of the following:

(1) The admissibility of an agreement to mediate a dispute. *(See Section 1122.1(b)(1) of new draft.)*

(2) The effect of an agreement not to take a default in a pending civil action. *(See Section 1122.1(b)(2) of new draft.)*

(f) This section applies to communications, documents, and any writings as defined in Section 250, that are made or prepared in the course of attempts to initiate mediation, regardless of whether an agreement to mediate is reached. *(Dropped from new draft; general approach of SB 1522 incorporated instead. If the Commission decides to follow that approach, references to mediation consultation should be incorporated into Section 1127, as well as in the statutes shown here.)*

(g) The protection of paragraphs (1) to (3), inclusive, of subdivision (a) applies to a mediation notwithstanding the presence of a person who observes the mediation for the purpose of training or evaluating the neutral or studying the process. *(See Section 1122(d) of new draft.)*

(h) Nothing in this section prevents disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute. *(See Section 1122.1(b)(3) of new draft.)*